Supreme Court, U.S.
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96-1367

No.

In The

Supreme Court

of the United States

October Term 1996

TAYLOR EQUIPMENT, INC. fka Taylor Equipment Rental Company dba Midcon Equipment Company

Petitioner,

JOHN DEERE COMPANY, a Delaware Corporation,

and

JOHN DEERE INDUSTRIAL EQUIPMENT COMPANY, a wholly owned subsidiary,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF THE PETITIONER

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Petitioner wishes to reply to assertions made by Respondent in its Statement of the Case. Correcting Respondent's misstatements of law and fact is fundamental to understanding the premise underlying Petitioner's request for the Writ of Certiorari.

1.The Eighth Circuit Opinion does construe the Uniform Commercial Code which has been adopted in fifty-one jurisdictions.

The obligation of good faith and fair dealing derives from both the Uniform Commercial Code and a state's common law. Contrary to Respondents' assertion that the issue in this case does not present an issue under the UCC, the Eighth Circuit implicitly recognizes the dual origin of the implied obligation and explicitly refers to Uniform Commercial Code construction at several places in the opinion. (See, e.g., Petition at 7a, 22a, 23a, 24a). The panel opinion also refers to and relies heavily on *Garrett v. BankWest, Inc., 459 N.W.2d 833 (S.D. 1990)* which rests on South Dakota common law, but also explicitly adopts the Uniform Commercial Code definition of "good faith."

Respondent submits that this case presents only questions of state law. This case concerns an ongoing relationship between a dealer and its manufacturer involving the sale of goods, and is therefore governed by Article 2 of the UCC. *Taylor* is a case about performance of a contract under provisions which are uniform in fifty-one jurisdictions. Respondent is aware that the district court instructed the jury on obligations under UCC 2-103(1)(b):

> Good faith: In the case of a merchant means honesty in-fact and the observance of reasonable commercial standards of fair dealing in the trade.

The district court's jury instructions virtually track this language by pointing out that Deere had to "act fairly and reasonably" in considering the proposed assignment. Article 2 of the Uniform Commercial Code and the obligation of good faith derived therefrom is precisely what is being construed by the Eighth Circuit and the Eighth Circuit's construction is in direct conflict with theconstruction adopted by other circuits. This Court needs to establish a consistent statutory interpretation of the uniform provisions among the jurisdictions.

As pointed out in Petitioner's Brief, the circuits that have addressed the issue of contract performance are clearly in conflict with the decision reached by the Eighth Circuit. In the Second, Sixth, Tenth and D.C. circuits, the circuit courts of appeal have held that the obligation to perform in good faith exists in every contract including those contracts that contain express and nonambiguous provisions permitting either party to terminate a contract without cause. *See also United Roasters, Inc. v. Colgate Palmolive Co., 649 F.2d 985 (4th Cir.), cert. denied, 454 U.S. 1054, 102 S.Ct. 599, 70 L. Ed. 2d 590 (1981)* (a manufacturer has an obligation of good faith performance up until its right of termination is actually effective). *Id.* at 990. The Eighth Circuit result is directly opposite.

A very recent case from the Supreme Court of the State of New Jersey is instructive on this very issue although Petitioner recognizes that the state court is not precedent for This Court. In *Sons of Thunder, Inc. v.*

Borden, Inc., 1997 WL 104592 (N.J.) (decided March 11, 1997 by unanimous court and addressing the precise issue of the obligation of good faith in a contract which contains an absolute right to terminate), the New Jersey supreme court held: "A party to a contract may breach the implied covenant of good faith and fair dealing in performing its obligations even when it exercises an express and unconditional right to terminate."

Wrongful termination is fundamentally different from wrongful performance. The Uniform Commercial Code governs contract performance in 51 jurisdictions. Circuits should be uniform in holding that juries have a right to decide whether the covenant of good faith and fair dealing has been breached in the context of cases *Taylor.*

2.The relationship between Deere and Taylor was a franchise relationship.

Respondent submits that there was no franchise relationship involved in this case. On this sole basis, Respondent attempts to distinguish *Larese v. Creamland Dairies, Inc., 767 F.2d 716 (10th Cir. 1995)* which is the principal case upon which Petitioner is relying in asserting the conflict among the circuits.

SDCL 37-5A-1 defines a franchise as:

> [a] contract or agreement, either express or implied, whether oral or written, for a definite or indefinite period, between two or more persons:
>
> (1)By which a franchisee is granted the right to engage in the business of offering

> **or distributing goods or services using the franchisor's trade name, trade-mark, service mark, logo-type, advertising, or other commercial symbol of related characteristics;**
>
> **(2)In which the franchisor and franchisee have a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement or otherwise; and**
>
> **(3)For which the franchisee is required to pay, directly or indirectly, a franchisee fee.**

Dealer agreements such as the one between Deere and Taylor are franchises under South Dakota law. See *Groseth Int'l, Inc. v. Tenneco, Inc., 410 N.W.2d 159 (S.D. 1987); also 440 N.W.2d 276 (S.D. 1989)*; *Mitchell Machinery, Inc. v. Ford New Holland, 918 F.2d 1366 (8th Cir. 1990).*

The Eighth Circuit in its analysis of Midcon's original wrongful cancellation claim considered the agreement as a franchise. (Petition 16a, f. 8; see also Judge Gibson's reference to Respondent's argument regarding the "franchise" at 27a). *Larese* remains a case nearly factually and legally identical to *Taylor.*

CONCLUSION

The courts of appeal are in conflict on an issue of general public importance and widespread commercial application. There are thousands of dealers whose rights under the Uniform Commercial Code have been effectively eliminated by the Eighth Circuit decision. A Writ of Certiorari should issue.

Respectfully submitted this 7th day of April, 1997.

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